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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

OLIVER C. CHRISTENSEN,

Petitioner,

– against –

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

LAWRENCE W. KRIEGER
Attorney for Petitioner
295 Madison Avenue
New York, New York 10017
(212) 679-1214

QUESTIONS PRESENTED

1. Whether the opinion sought to be reviewed decided a federal question in a way in conflict with Stirone v. United States, 361 U.S. 212 (1960)?

2. Whether this Court should, once and for all, resolve the issue left unsettled in United States v. White, 401 U.S. 745, as to whether Court Orders are required for electronic surveillance where only one party to such surveillance has knowledge thereof and consents thereto?

3. Whether petitioner's Due Process right were violated by the introduction of a tape recorded conversation made in California in violation of California law which also precludes the use thereof in any criminal prosecution, save for the prosecution of the individual who recorded the conversation without the consent of all of the parties thereto?

Questions Presented

4. Whether there was sufficient evidence with which to convict the petitioner of aiding and abetting the mail and wire frauds perpetrated by the co-defendant?

5. Whether there was sufficient evidence with which to convict the petitioner of making false declarations before the Grand Jury?

PARTIES

The parties in the United States Court of Appeals for the Second Circuit were the United States of America, Frank J. Landi and the petitioner herein, Oliver C. Christensen. On the District Court level, Edward Talbot was a defendant listed in the indictment; however, he was severed before trial.

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In the

SUPREME COURT OF THE UNITED STATES

October Term, 1983

OLIVER C. CHRISTENSEN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, OLIVER C. CHRISTENSEN, prays that a Writ of Certiorari issue to review the Order of the United States Court of Appeals for the Second Circuit, entered December 19th, 1983.

OPINION BELOW

A copy of the Opinion of the United States Court of Appeals for the Second Circuit, decided the 19th day of December, 1983, is annexed hereto as Appendix A.

JURISDICTION

The Judgment of Conviction was entered on the 27th day of June 1983, convicting Petitioner of violating the mail fraud statute [18 U.S.C. 1341 & 2], wire fraud [18 U.S.C. 1343 & 2], and false declarations before the Grand Jury [18 U.S.C. 1623], after trial before United States District Judge Charles L. Brieant, sitting in the Southern District of New York, and a Jury.

Co-defendant Frank J. Landi was

convicted on the 2nd day of June 1983 of mail fraud [18 U.S.C. 1341 & 2] and wire fraud [18 U.S.C. 1343 & 2]. Edward Talbot, named as a defendant in the Indictment, was severed for trial and, we believe, has yet to be tried.

The Order and Judgment of Affirmance of the United States Court of Appeals for the Second Circuit is dated the 19th day of December 1983. That order, which also constitutes the Opinion of the Court, is annexed hereto as Appendix A.

The Jurisdiction of this Court is invoked under 28 U.S.C. Sections 1254 and 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment of the United States Constitution, Due Process Clause, is involved herein. The principal

statutory provisions, as far as pertinent, are contained in Section 632 of California's Penal Code, the pertinent parts of which are set forth in the Appendix hereto.

STATEMENT OF THE CASE

Petitioner Christensen stands convicted of three Counts of aiding and abetting co-appellant Landi in the perpetration of both mail and wire fraud and of one Count of false declarations before a Grand Jury. He is sentenced to a total of three years of imprisonment. Broken down to their constituent acts, Mr. Christensen's convictions actually reflect one set of transactions and an appearance before the Grand Jury.

The first set of transactions consists of his issuance of bonds for the Casualty & Indemnity Company of Belize. These

purportedly fraudulent documents are introduced into evidence to support his aiding and abetting co-defendant Landi in a whole series of mail and wire frauds. Mr. Christensen was convicted of each Count of mail and wire fraud, despite the undisputed fact that there was no arrangement whereby he and co-defendant Landi cooperated or worked together in the underlying events. He was an officer of the Casualty & Indemnity Company of Belize and, in such capacity, received a fee for such service.

The false declarations before the Grand Jury charge arose out of his statement that he did not own stock in the Casualty & Indemnity Company of Belize, which was consistent with his statement to a known agent of the Federal Bureau of Investigation, and inconsistent with his statement to an undercover agent.

REASONS FOR GRANTING THE WRIT

I

THE COURT'S CHARGE TO THE JURY HAD THE EFFECT OF SHIFTING THE BURDEN OF PROOF TO THE DEFENDANT AND THUS DEPRIVED PETITIONER CHRISTENSEN OF A FAIR TRIAL.

A. Introduction

Petitioner Christensen was convicted of mail fraud, wire fraud and false declarations before the Grand Jury on the basis of two truly remarkable, unprecedented and frightening legal "theories." Essentially, he was convicted, with regard to the mail and wire fraud Counts, of accepting a fee on behalf of the Casualty & Indemnity Company of Belize and in exchange issuing a bond to Mr. Landi's company, which bond was, in turn, used by Mr. Landi in a marketing program.

Thus, in a nutshell, a private busin-

essman stands convicted of the serious federal crimes of mail fraud, wire fraud and false declarations before the Grand Jury and stands sentenced to three years of imprisonment for doing what thousands of American businessmen do every day of the year: receiving a fee for a legitimate service and puffing as to ownership of a company he worked for while telling the truth before a Grand Jury and to a federal investigator.

B. **The Defense Theory**

Mr. Landi's trial counsel, as part of his defense theory, stated in his opening statement:

> "This was no cozy arrangement where he (Landi) and Christensen decided 'we will get together and pull a scam on the public.' It was far from that. The government has documents which show that this was

not the case.

Mr. Landi met Mr. Christensen sometime in July or August of 1978, just before the bond arrangement was made. He didn't know this man. He had never met him before. They dealt at arm's length. This was no friendly arrangement. You will see evidence which will show there was a very good deal of controversy between these two men concerning the negotiations for the bond, what the terms of the bond would be, how much the premium was going to be for the bond and what collateral was going to support this bond.

This all occurred privately between the two of them, and you will see the letters and telegrams that went back and forth to show that this was an adverse relationship here. They were not in cahoots. By far, they were -- as I said, Mr. Landi ended up bringing a lawsuit against Mr. Christensen and Casualty Indemnity."

Mr. Christensen's trial counsel made

the defense theory with regard to the mail and wire fraud counts explicit from the beginning in his opening remarks:

> "I find according to the government that Mr. Landi and Mr. Christensen were business bedfellows. That shocks me. The gentlemen never saw each other more than three times in their lives up until this very day, and in fact as the evidence unfolds before you, you will see that rather than friends, they were adversaries. Mark that well. Adversaries. Now, I don't know any adversaries who scheme to defraud anybody.
>
> If one is going to scheme, what does one do? One is surreptitious. One hides, one conceals. You are not going to find any concealment here. You will find both Landi and Christensen just as open as a book with nothing in the world hidden. It is all laid bare for you to see and you shall see every bit of it.
>
> Did they profit from this alleged scam? If this is to be a scam, then some-

> body has got to profit from something. Did Mr. Christensen put any money in his pocket from this bit? From all of this action with Com Link and Buy Sell and hereafter, and even after that look very carefully to see how much Mr. Christensen put in his pocket. A very, very good question and you will not be surprised at the answer when it turns out to be zero, nothing.
>
> Now, the bonds and this so-called sham corporation. What is a sham corporation? The government will probably try to tell you. I leave that to their evidence, but a valid corporation is not a sham and whether its office is in a chicken coop or in my back pocket or in the Empire State Building, as long as it is duly authorized by the nation or state wherein it functions, it is a valid corporation and not a sham."

It is clear that no matter what the jury thinks about Mr. Christensen, it is apparent that Casualty & Indemnity Company made its money when the premium was paid

for the bond and that Mr. Christensen had little interest in how Mr. Landi would make his money. In fact, if we assume that every fact testified to at trial by any witness for the Government was true, and given a most favorable light, all we would have is Mr. Christensen cheating Mr. Landi out of a premium (a crime for which Mr. Christensen was never charged) and Mr. Landi cheating the "investors," a series of crimes for which Mr. Landi was charged. As to the false declarations before the Grand Jury, taking as true that Mr. Christensen testified before the Grand Jury that he did not own any stock in Casualty & Indemnity Company, a statement wholly consistent with the oral statement he made to the known agent of the Federal Bureau of Investigation, his puffing to a man he wanted to impress was the lie. The weight of the credible evidence is that Mr.

Christensen only lied when "puffing" not when under oath.

C. The Charging Conference

At the charging conference, the trial judge clearly indicated that "Yes, all of you may have an exception without asking for it as to anything that you have requested in writing, or orally on the record, which is not given in substance." There, the trial judge declined to charge that secret profiting from the scheme is a classic indication of intent to defraud; that there is a presumption that a bond is valid where issued and the Government has the obligation to rebut that presumption to a point beyond a reasonable doubt; that a corporation organized and licensed to do business in the jurisdiction of its origin is entitled to the presumption of legality and the burden of rebutting that presump-

tion lies with the Government since a duly authorized corporation is not a sham; that a guarantee bond is a contract whereby one party requests a second party to provide that in the event the first party fails to perform its obligation to a third party, then upon request, the second party undertakes to either perform the obligation of the first party or to pay damages for such failure; that where a guarantee bond is contracted for, the party obtaining the bond must comply in full with the requirements of the bonding company which is to issue the bond since partial compliance is insufficient to make a valid contract; that in order for a bond to be fraudulent, a claim must first be made against the bonding company and then there must be a default by the bonding company in the fulfillment of its obligation; that in order to find Mr. Christensen guilty, the

jury must find that he secretly profited by the scheme; that corroboration is required for a conviction of false declarations before the Grand Jury; and that guilt must be proven to a moral certainty.

D. The Court's Instruction

Although defense counsel submitted formal (written) Requests to Charge concerning the prima facie legitimacy of Casualty & Indemnity and the bonds which it issued, the court rejected all essential aspects of the defense requests.

The trial court began its instructions on the treatment of the bond by stating:

> "A bond is sham if it looks like a real bond but is not intended to have real effect of a surety bond or a performance bond, to save another person harmless in the event of a default in performance by the prin-

> cipal, that is to say Com Link Corporation.
>
> If you find from all of the evidence that the so-called C & I Company had no assets and was not actually engaged in the business of issuing performance bonds guaranteeing the performance of the contracts of others, then you may find that it was a sham bond; and if you find beyond a reasonable doubt that Mr. Christensen knew the bond was sham and that he was injecting it into the sales effort for the Com Link Buy Sell agreements intending to make a scheme to defraud successful, if that is what it was, then you may find Mr. Christensen guilty as an aider and abettor on the mail and wire frauds counts which remain open as against him."

Thereafter, the Judge confused one element with another, making them interrelated, ultimately permitting the jury to convict Mr. Christensen of both mail and wire fraud solely on apparently fraudulent acts of each defendant and in the clear

absence of any evidence tending to demonstrate that Mr. Christensen actually aided and abetted Mr. Landi in Mr. Landi's marketing program of the Com Link Buy Sell agreements. With regard to the false declarations before the Grand Jury count, the trial court made no distinction between statements made to a known agent of the Federal Bureau of Investigation and those puffing statements made by salespeople or business people for the purposes of impressing one another.

The plain meaning of the instruction is that within the context of a trial showing various independently fraudulent acts, the requisite intent of the two defendants at trial to work together for a common goal may simply be assumed and, in the case of the false declarations before the Grand Jury count, the jury was left with no distinction between the puffing

made to an assumed business acquaintance and a statement made to a known agent of the Federal Bureau of Investigation. Both were given equal weight with the jury left to flip a coin as to which one was true.

All phases of the defense should have been covered by the instructions because a defendant has an absolute right to have the jury instructed upon any theory that the testimony may reasonable present if it is not unreasonable or stamped with improbability [Little v. United States, 73 F.2d 861, 96 A.L.R. 889]. Here, the defense was centered upon three theories: (a) Messrs. Christensen and Landi never worked together for a common goal, Christensen having received his money by the sale of the bond to Landi; (b) the Casualty & Indemnity Company and the bonds which it issued were prima facie legitimate on their faces in the absence of any proof to the contrary; and that (c)

a businessman's puffing to an acquaintance deserves less weight than his formal statement to a known federal agent. Here, where Mr. Christensen admits many of the facts used to convict him but denies certain essential elements of the crimes charged, he should have received a specific instruction that he is to be acquitted if those essential elements are found lacking.

Moreover, the court erred in giving instructions couching the bond and carrier as "so-called" and indicating that even though the corporation may be legally constituted in Belize, with bonds being a natural function of such a corporation, without more, they could be found to be "sham."

Essentially when, as here, there is absolutely no evidence tending to demonstrate any involvement of Mr. Christensen

with Mr. Landi's marketing effort, it should have been made crystal clear that aiding and abetting means to assist in the perpetration of a crime [United States v. Williams, 341 U.S. 58, 95 L.W. 747, 71 S. Ct. 595]; that in order to convict a defendant of aiding and abetting, the defendant must know that activity condemned by law is actually occurring and must intend to help the perpetrator [United States v. McDaniel, 545 F.2d 642].

E. The Nature of of the Charge.

It must be emphasized that there was objection to the Charge. However, even in the absence of proper objection, plain error may nevertheless be reviewed upon appeal. Moreover, this Court may take notice of errors in the instructions to the jury asserted by counsel for the first

time on appeal when, as here, notice of the error is necessary to prevent injustice [United States v. Houle, 490 F.2d 167, cert. den. 417 U.S. 970, 41 L.Ed.2d. 1141, 94 S.Ct. 3174] or when, as here, the error in the instructions affects the substantial rights of the defendant [Bird City Equity Mercantile Exchange v. United States, 338 F.2d. 790].

Here, where all of the evidence is consistent with the defense theory that Christensen did not act in concert with Landi, special instructions were warranted as to the defense theory that Mr. Christensen's business with Mr. Landi concluded before the mail and wire frauds occurred -- in other words, if Christensen defrauded anyone, it was Landi and that a finding that Christensen defrauded Landi would be inconsistent with guilt of the crimes of aiding and abetting the crimes

of mail and wire fraud. As a matter of fact, the Charge permitted a finding that Christensen defrauded Landi to support both the mail fraud and the wire fraud, permitting a conviction on charges other than those contained in the indictment against him [Stirone v. United States, 361 U.S. 212, 217 (1960); Ex Parte Bain, 121 U.S. 1 (1887)].

The test which can be applied here is really quite simple: If, for the sake of argument, we were to assume that Christensen is totally innocent of aiding and abetting Landi and further if we adopt, for the sake of argument, Christensen's theory that he simply defrauded Landi, if he defrauded anybody at all, Christensen would nevertheless be guilty of aiding and abetting Landi by the expanded definition of aiding and abetting provided first by the prosecutor and then by the trial judge

in his instructions to the jury:

(a) In the Government's opening, it is claimed that the mere turning over of the bond document to Landi by Christensen constitutes aiding and abetting. The prosecutor explained that "Mr. Landi is charged in those counts with setting up the Buy-Sell Program and the fraud and Mr. Christensen is charged with aiding and abetting Mr. Landi, helping him carry this out by giving him the bond, because without that bond the investors wouldn't have put up their money."

(b) In her closing, the Assistant United States Attorney reiterated her error by stating that "But most of the investors here relied upon the bond which was given to Mr. Landi by Chris Christensen. Without the Casualty & Indemnity bond, without the trappings, the gold seal and the fancy paper, many of the people would never have invested. So Mr. Chris-

tensen's role in this case is what we call aiding and abetting. He helped Mr. Landi carry out the fraud."

(c) The instructions to the jury bolstered this error by inclusion of the statement that if the jury believed that Christensen "inject(ed) it (the bond) into the sales effort for the Com Link Buy Sell agreements intending to make a scheme to defraud successful . . . then you may find Mr. Christensen guilty as an aider and abettor on the mail and wire fraud counts which remain open as against him."

So, it is now possible that predicated upon the Government's explanation of the law and the court's instructions to the jury that even if Christensen only misrepresented facts to Landi, he could nevertheless be convicted of aiding and abetting Landi to defraud the investors. The jury never even had the opportunity to

choose between Christensen's defrauding Landi, on the one hand, and Christensen's aiding and abetting Landi on the other [Little v. United States, 73 F.2d. 861, 96 A.L.R. 889]. This becomes relevant also to the requisite element of intent for intent to defraud Landi does not satisfy the intent requirement in aiding and abetting Landi to defraud the investors. Yet, the jury had no choice here and the subject of intent was confused.

Accordingly, the Court permitted the jury to convict if it found that Christensen had the requisite intent to defraud anybody -- inclusive of Landi. Obviously, the Government came close to asking the jury to conform the pleading to the proof.

While the nature of the objection to the Charge may be subject to discussion, even if there had been no objection, the Charge constitutes plain error because it affects substantial rights to the extent

of permitting a defendant in a criminal prosecution to be convicted of a charge other than the charge contained in the indictment. Even in the absence of a timely objection, such plain error in the Charge will be noticed, as allowed by Rule 52(b) of the Rules of Criminal Procedure, because it plainly affects substantial rights [Fogarty v. United States, 363 F.2d. 201; Moore v. United States, 262 F.2d. 216; Conley v. United States, 257 F.2d. 141; Tomley v. United States, 250 F.2d 549; United Brotherhood of Carpenters & Joiners v. United States, 330 U.S. 395, 91 L.Ed. 973, 67 S.Ct. 775]. Under Rule 52(b) of the Rules of Criminal Procedure, this Court, in its discretion, may even consider a submitted requested instruction not given in the Charge even if this Court finds that the omission was not called to the trial court's attention at the con-

clusion of the Charge as requested by Rule 30 because plain error affecting substantial rights is manifest [Malatkofsky v. United States, 179 F.2d. 905]. The prejudice manifest here is so strong that this Court has determined that the effect thereof is clearly unconstitutional [Stirone v. United States, 361 U.S. 212].

Since the indictment charged fraud (inclusive of the requisite element of intent) as against the investors and Christensen with aiding and abetting that fraud, it was plain error to submit to the jury the question in an expanded version so as to permit a conviction on Christensen's uncharged intent to defraud Landi. The variance between pleading and proof herein involved is significant and clearly prejudicial as a matter of law because it deprived Christensen of his substantial right to be tried for a felony only on charges presented in an Indictment return-

ed by a Grand Jury. Since the petit Jury may have based Christensen's conviction of the aiding and abetting mail and wire fraud counts on a finding that he possessed the requisite intent to defraud Landi, the conviction must be reversed as a matter of law [Stirone v. United States, supra].

F. Aiding and Abetting

Dovetailing with our argument, supra, that the Court's instructions to the Jury created an impermissible expansion of the crimes charged is our argument that the essential element of "intent" is absent in the proof here and that the evidence is as consistent with innocence as guilt.

G. Sworn, Official and Extemporaneous Statements.

In denying Christensen's oral motion, made during trial, to set aside the verdict of guilty as to the false declaration charge, the Court mentioned Christensen's out-of-court statement to the case agent made prior to entering the Grand Jury room and added that the "statement carries the indicia of truthfulness because it was made under the penalty of 18 U.S.C. Section 1001." Yet, this important thought was clearly omitted in the Court's instructions to the Jury.

Furthermore, there was insufficient evidence at trial to support a finding that the subject statement was material, in other words, there was a failure of proof on the part of the Government. Even if sufficient evidence had been intro-

duced, the statements of Christensen were not material as a matter of law.

Since materiality is an essential element of the crime charged under 18 U.S.C. 1623(a), it was incumbent upon the Government at trial to prove the materiality of Christensen's statements before the Grand Jury [United States v. Freedman, 445 F.2d. 1220, 1227 (2d Cir. 1971)]. Basically, he denied ownership of Casualty and Indemnity while other witnesses said he did own the company. The evidence, however, falls short of the "clear, convincing and direct evidence" required by Brown v. United States, 245 F.2d. 549, 556 (8th Cir. 1957) to sustain a conviction, as the testimony does not bear upon the question of whether the statements had the tendency to influence, mislead, or hamper the Grand Jury's investigation; and there was no evidence before the trial court on the scope of the investigation that would

on its face establish the materiality of an inquiry into ownership of Casualty and Indemnity, a totally irrelevant issue to the subject matter apparently presented to the Grand Jury.

While the Indictment does tell us that the Grand Jury was enquiring about the identity of the individuals controlling the Casualty and Indemnity Company, such allegation is unsupported by the proof at trial. However, without proof tending to demonstrate how the ownership and control of Casualty and Indemnity was material, the evidence was insufficient to support a conviction [United States v. Freedman, supra; United States v. Stone, 429 F.2d. 138, 140 (2nd Cir. 1970)]. Christensen, therefore, was entitled to a directed verdict of acquittal under Rule 29, motions for which were properly made and preserved below.

The overall effect of the trial Court's Charge, when taken as a whole, is to shift the burden of proof to the defendant and thus to deprive him of a fair trial: Mr. Christensen was de facto afforded the burden of proof in demonstrating that his statement under oath was, in fact, true; that he had no connection with the acts of Mr. Landi; that he was an independent operator insofar as Mr. Landi is concerned; and that the normal business operations of a foreign corporation were legitimate.

II

THE MAIL AND WIRE FRAUD CONVICTIONS MUST BE REVERSED BECAUSE THE EVIDENCE WAS INSUFFICIENT TO ESTABLISH GUILT BEYOND A REASONABLE DOUBT OF AIDING AND ABETTING ANY VIOLATION OF THE MAIL OR WIRE FRAUD ACTS.

The mail and wire fraud violations require, at their heart, an intent to defraud. In this case, both the indictment and the court's Charge proceeded on the legal theory that the petitioner aided and abetted Mr. Landi in planning and executing a plan to defraud investors, a theory which, if proven, would constitute a violation.

As set forth in the Government's summation, the evidence relied upon to support the allegations that Mr. Christensen aided and abetted Mr. Landi's planning and execution of a scheme to defraud investors came from the evidence relating to the bonds and the Casualty &

Indemnity Company itself.

Yet, we have pure innuendo concerning the operations of the Casualty & Indemnity Company and less concerning its ordinary course of business.

Fraud cannot be presumed; but must be proved, and where the evidence does not necessarily lead to the presumption of a fraudulent intent, but is as consistent with innocence as with wrongdoing, that construction must be placed upon it which will exonerate the party implicated from a dishonest intent; this is the true meaning of the Government's burden of proving each and every element of the crime charged beyond a reasonable doubt.

Here the record is barren of any testimony concerning the allegation that Messrs. Christensen and Landi worked together in the development and/or execution of a scheme designed to defraud

investors. In fact, Mr. Christensen's connection with the operative events is limited to his sale of bonds and the receipt by him of premiums. There is no proof that the bonds were fraudulent.

The indictment charges Mr. Christensen with making false representations to investors (paragrapn 7), including the legitimacy of the bonds and the Casualty & Indemnity Company and the existence of the telephones. No evidence was even offered to the effect that Mr. Christensen made any representations to investors -- much less dealing with telephones. In fact, even though he did not make any representations to investors relating to his company and the bonds, such representations, if made, would not have been proven at this trial to be false. Of course, the theory of the prosecution changed in mid-stream: the Charge to the jury instructed them that these

allegations did not have to be proven in order to demonstrate that the crime had been committed.

It has long been recognized that a court cannot permit a defendant to be tried on charges other than those contained in the indictment against him [Stirone v. United States, 361 U.S. 212, 217 (1960); Ex Parte Bain, 121 U.S. 1 (1887)]. An amendment to the indictment -- i.e., an alteration in the charging terms either explicitly or constructively after the Grand Jury has passed upon them -- effectively deprives the accused of nonwaivable constitutional protections and thus requires reversal without regard to harmless error standards [Stirone v. United States, 361 U.S. 212, 215, 217 (1960); Ex Parte Bain, 121 U.S. 1 (1887); United States v. Beard, 436 F.2d 1084 (5th Cir. 1971); Gaither v. United States, 413 F.2d

1061, 1072 (D.C. Cir. 1969)].

A constructive amendment is deemed to have occurred when the proof at trial with respect to one or more of the essential elements of the crime charged is based upon evidence of a theory materially different from that presented to the Grand Jury [United States v. Silverman, 430 F.2d 106, 111 (2nd Cir. 1970), cert. denied, 402 U.S. 953, reh. denied, 403 U.S. 924 (1971)]. As the Second Circuit explained in Silverman:

> "Even though the indictment is drafted to charge the essential elements, the question remains whether on its face it presents evidence which assures us that such essential elements were presented to the jury and deliberated upon them in returning the indictment . . . The presence of such evidence would ensure that the defendant is not tried upon a theory or evidence which was not fairly embraced in the facts upon which the grand jury based its

charges."

See, also, United States v. Botticello, 422 F.2d 832, 834 (2nd Cir. 1970); United States v. Thomasetta, 429 F.2d 978, 980 (1st Cir. 1970).

Here, where Mr. Christensen was indicted for one crime -- aiding and abetting Mr. Landi in devising and executing a scheme to defraud investors -- and the Government's charge, theory and evidence at trial at best proved another crime -- that Mr. Christensen defrauded Mr. Landi -- a charge made by Mr. Landi in civil litigation -- a constructive amendment has occurred. Indeed, it is clear from the face of the indictment that not only was the Grand Jury presented with completely different "essential elements" than were presented to the petit jury at trial, but Mr. Christensen was "charged" with a completely different offense from that which he was convicted.

Here, we respectfully assert, the evidence was as consistent with innocence as with guilt of the crime charged. Certainly, such a difference flies in the face of the constitutionally-rooted policy designed to "prevent the usurpation of power by the court and prosecutor" which necessarily occurs whenever a defendant is convicted "'on the basis of facts not found by, and perhaps not even presented to, the grand jury which indicted him.'" [United States V. Silverman, 430 F.2d at 110, quoting Russell v. United States, 369 U.S. 749, 770 (1962)]. In fact, it is directly contrary to the indictment's purpose of "inform[ing] the defendant of the offense charged with sufficient clarity so that he will not be misled while preparing his defense" which was recognized by the Second Circuit in United States v. Brozyna, 571 F.2d 742, 746 (2nd

Cir. 1978) as one of the constitutionally required functions of the indictment.

Furthermore, the present case is a paradigmatic example of the principle enunciated by this Court in Stirone, supra, as interpreted by the Second Circuit in United States v. Knuckles, 581 F.2d 305, 312, cert. denied, 439 U.S. 936 (1978). Here, as in Stirone, the Court is certainly warranted in " . . . conclud[ing] that the Grand Jury might not have agreed" that the uncharged evidence constituted a basis for finding the essential elements required for the charged crime to have occurred. [Knuckles, supra, at 312] It appears from the face of the indictment that the Grand Jury found Mr. Christensen aided and abetted in the defrauding of the investors (not, for instance, the act of defrauding Mr. Landi). But to make such a finding, it was only necessary for the Grand Jury to

consider evidence that Mr. Christensen made false representations to the investors -- evidence which was certainly different from that presented at trial.

III

IF THE MAIL AND WIRE FRAUD COUNTS ARE REVERSED, THE FALSE DECLARATIONS BEFORE THE GRAND JURY COUNT MUST BE REVERSED FOR A NEW TRIAL BECAUSE IT WAS INEVITABLY TAINTED BY THE SPILL-OVER EFFECT.

Given the considerations stated above, it is plain that if, in addition to the mail fraud, the wire fraud count is reversed, the false declarations before the Grand Jury count must be reversed *a fortiori*. It would blink reality to conclude that there is no substantial likelihood that Mr. Christensen's conviction for false declarations before the Grand Jury was not influenced by the evidence, arguments and ambience of the principal

counts. Mr. Christensen is entitled to be tried on the false declarations before the Grand Jury count without the dominant intrusion of allegedly serious crimes which are not crimes at all, or concerning crimes about which there is insufficient evidence.

IV

THERE WAS INSUFFICIENT PROOF OF FALSE DECLARATIONS BEFORE THE GRAND JURY . . . AND THE PROOF PRESENTED WAS OBTAINED IN VIOLATION OF MR. CHRISTENSEN'S DUE PROCESS RIGHTS.

Special Agent McPherson of the Federal Bureau of Investigation testified that he taped a conversation with Mr. Christensen which contained a statement opposed to that which was given by Mr. Christensen under oath before the Grand Jury and to a known agent of the Federal Bureau of Investigation. That tape was made in

California.

We respectfully assert that, as we asserted below in the Second Circuit, this statement should have been suppressed as a violation of California Penal Code Section 632 which reads that every person "who, intentionally and without the consent of all parties to a confidential communication, by means of any electronic amplifying or recording device, eavesdrops upon or records such confidential communication . . . shall be punishable . . ." and such evidence "shall not be admissible in any judicial, administrative, legislative or other proceeding."

Nevertheless, such puffing by Mr. Christensen to one not known by him at that time to be a law enforcement official (indeed, McPherson had lied to Mr. Christensen about his identity) cannot sustain the burden of proving beyond a reasonable

doubt that a false declaration before the Grand Jury had been committed by the utterance of an inconsistent statement. Here, as in all criminal prosecutions, the proof must be beyond a reasonable doubt [United States v. Clizer, 464 F.2d 121, cert. denied, 409 U.S. 1086, 34 L.Ed.2d 673, 93 S.Ct. 697, reh. denied, 410 U.S. 948, 35 L.Ed.2d 616, 93 S.Ct. 1379].

Section 632 of California's Penal Code presents participants to conversations a wider protection than that afforded to citizens elsewhere. It specifically provides that:

> "(a) Every person who, intentionally and without the consent of all parties to a confidential communication, by means of any electronic amplifying or recording device, eavesdrops upon or records such confidential conversation, whether such communication is carried on among such parties in the presence of one another or by

> means of a telegraph, telephone or other device, except a radio, shall be punishable . . ." (emphasis supplied)
>
> "(b) The term 'confidential communication' includes any communication carried on in such circumstances as may reasonably indicate that any party to such communication desires it to be confined to such parties . . ."

And to make matters clearer relative to the use of such illegal recordings in criminal prosecutions, California law further states that "(d) Except as proof in an action or prosecution for violation of this section, no evidence obtained as a result of eavesdropping upon or recording a confidential communication in violation of this section shall be admissible in any judicial, administrative, legislative or other proceeding."

While certain specified state law enforcement officers are exempted from

Section 632 as to certain specified communications, such section is not relevant here since an agent of the Federal Bureau of Investigation does not fall within that category.

Electronic surveillance was conducted in the case by use of a recorder by Special Agent McPherson of the Federal Bureau of Investigation posing as a business associate of defendant Christensen. Supposedly McPherson consented to the use of electronic listening devices in conversations which he had with Christensen. While allegedly justified under United States v. White, 401 U.S. 745, that case was prior to Katz v. United States, 389 U.S. 347, and White was a mere plurality opinion of the Supreme Court. Thus, both the Fourth Amendment and Christensen's "reasonable expectation of privacy" -- amplified by the California statute -- rendered the electronic surveillance

unconstitutional and inadmissible without court orders.

The Government elected to use electronic surveillance in this case, probably in an attempt to corroborate the statements of the single most important witness on the false declarations before the Grand Jury count, Special Agent McPherson.

The use of electronic surveillance where only one party consents to the eavesdropping has been employed very widely since the Supreme Court's decision in United States v. White, 401 U.S. 745. It, of course, had also been used previous thereto; but many law enforcement agencies apparently look upon White as authorization or carte blanche to use this method of electronic surveillance.

It is respectfully contended that White was a Plurality Opinion of the Sup-

reme Court of the United States and was decided prior to Katz v. United States, 389 U.S. 347, 364.

Just a mere plurality of the Supreme Court voted to save the "misplaced confidence" doctrine of On Lee v. United States, 343 U.S. 747 and Lopez v. United States, 373 U.S. 427.

This "misplaced confidence" exception to the normal warrant requirement is inconsistent with the "reasonable expectation of privacy" standard of Katz v. United States, 389 U.S. 347, and we maintain therefore that it should be abolished. [See, Holmes v. Burr, 414 U.S. 1116.]

It will be recalled that Justice Black's cryptic concurrence in United States v. White, supra, mentioned the fact that it did not apply since this was a pre-Katz eavesdropping.

Justice Black cast the swing vote in United States v. White and his concurrence

in the Judgment of the Court was for the reason set forth in his dissent in Katz v. United States, 389 U.S. 347, 364. However, he also noted "his adherence" to "his views expressed in Linkletter v. Walker, 381 U.S. 618." In Linkletter, Mr. Justice Black maintained that Mapp v. Ohio, 367 U.S. 643, should have been applied retroactively.

It must be borne in mind that in his concurrence in United States v. White, Justice Black re-asserted the position which he had taken in Katz, namely that electronic surveillance was not within the ambit of the Fourth Amendment.

In Katz v. United States, however, the Supreme Court made it very clear that seizure of the spoken word was within the purview of the Fourth Amendment and, consequently, Black's concurring and controlling fifth vote is inapplicable in view of

Katz v. United States.

It is argued that: (1) electronic recording produces more reliable evidence than human recollection; (2) that law enforcement authorities need unhampered electronic surveillance to protect us from crime; and (3) that the exclusion of evidence obtained in this way hurts society. These arguments do not hold up.

Evidence obtained by machine is not necessarily more reliable than human recollection. A machine has considerable ability to distort. It focuses on a single element in a total environment and can yield deceptive results. A recorder captures voices without facial gestures and other subtle details. Nor is a picture any more accurate. However, the reliability argument is certainly irrelevant. Evidence obtained by illegal search or seizure is excluded not because of unreliability, but because of the values its

exclusion protects.

As for the second argument, the Government's legitimate interest in detecting and preventing crime must be balanced against the individual's freedom from unjustified intrusions. That balance was struck by the draftsmen of the Fourth Amendment when they required advance authorization of searches and seizures by a magistrate upon a showing of probable cause.

Rarely articulated but frequently evinced hostility to the Exclusionary Rule underlies the third argument:

> "The case presents some of the most vexing and pressing problems of our day: What are the constitutional limitations on governmental electronic intrusions into privacy? Do the Fourth and Fourteenth Amendments circumscribe warrantless electronic intrusions as effectively as they limit corporeal invasions of

> privacy? Are the protections of the Fourth and Fourteenth Amendments diluted if the person subjected to the warrantless electronic intrusion is suspected of a crime?" [Dissent of Hufstedler, J. in Holmes v. Burr, supra]

The Dissenting Opinion in Holmes v. Burr, supra, went on to explain the impact of warrantless surveillance:

> "The corrosive impact of warrantless participant monitoring on our sense of security and freedom of expression is every bit as insidious as electronic surveillance conducted without the consent of any of the parties involved. In terms of the individual's reluctance to speak freely, no qualitative difference exists between the danger posed by third party interception and the risk that his auditor has sanctioned a secret recording on their conversation . . . "

The holding of Olmstead was finally overruled in Katz v. United States. There, the Court explained:

> "The Fourth Amendment

protects people, not places."

Tucked into Olmstead was a passing reference to the theory that persons subjected to warrantless electronic interception volunteer their statements to the Government by their very act of talking to each other. This theory later emerged as the constructive consent and assumption of risk fictions relied on in On Lee v. United States, supra, 343 U.S. at 753-54 and Lopez v. United States, supra, 373 U.S. at 439. In Lopez, the majority added the variation that a person talking face-to-face with a known government agent assumes the risk that the agent will be able to repeat the conversation either by total personal recall or by a corroborative recording which in its nature is more reliable than human recollection. The theme was replayed in a slightly different

way by the plurality in United States v. White.

Using familiar jurisprudential tools, Holmes can be successfully distinguished from every other Supreme Court Decision directly bearing on the case other than Katz. Thus, On Lee and Lopez not only are factually dissimilar, but, more importantly, were based on trespassory concepts discredited by Silverman v. United States, 365 U.S. 505 (1961); Osborn v. United States, 385 U.S. 323; and Berger V. New York, 388 U.S. 41 and destroyed by Katz. Rathbun v. United States, 355 U.S. 107 (1957), dealt with governmental eavesdropping by extension telephone without electronic recording, and the Decision was confined to an interpretation of Section 605 of the 1934 Federal Communications Act (47 U.S.C. Section 605). Schwartz v. Texas, 344 U.S. 199 (1952), involved facts similar to Rathbun, but the Decision was

based on the pre-Mapp authority refusing to apply the exclusionary rule to State Courts. Schwartz was over-turned by Lee v. Florida, 392 U.S. 378 (1968), a post-Mapp case, holding inadmissible under Section 605 telephone conversations overheard on a party line and recorded. Lewis v. United States, 385 U.S. 206 (1966) and Hoffa v. United States, 385 U.S. 293 (1966), like Holmes, concerned the use of confidants who were secretly governmental informers, but in neither case was electronic surveillance employed. The facts in White were closer to those in On Lee than to Olmstead or Holmes. However, of much greater significance is the fact that White necessarily applied pre-Katz law because the electronic surveillance of White occurred before Katz was decided, and Katz had been earlier held nonretroactive in Desist v. United States, 395 U.S.

244 (1969). United States v. White is nevertheless important because it reveals continuing reliance by some of the Justices on the assumption of the risk doctrine [See, United States v. White, supra, at 754 (White, J.).]

Although the holding in White was based upon the nonretroactivity of Katz, several of the Justices did express views on the effect of Katz on participant electronic surveillance. Mr. Justice White, writing for the Chief Justice and Justices Stewart and Blackman, suggest that On Lee remained sound law. Justices Brennan, Douglas, Harland and Marshall each wrote separate opinions arguing that the result in On Lee could not survive Katz. Mr. Justice Black, concurring in the Judgment of the Court, did not address this issue, merely asserting the position taken in his Katz dissent that electronic surveillance was not within the ambit of the Fourth

Amendment.

Proponents of the assumption of the risk doctrine, apparently recognizing the significant intrusion upon an individual's privacy caused by participant monitoring, do not say that everyone must anticipate and risk warrantless surveillance; rather, they limit its application to those who contemplate illegal activity. But never do these proponents explain how, absent the Fourth Amendment requirement of antecedent justification before a neutral magistrate, the sinful can be separated from the saintly without probing everyone or leaving the selection to the unbridled discretion of the government agents.

Adoption of the assumption of the risk theory ultimately rests on the cynical conclusion that a warrantless search is justified by what it reveals.

In the conclusion of her Dissenting

Opinion, Judge Hufstedler, in Holmes v. Burr, supra, sets forth cogent argument indicating how destroying a right protected by the Fourth Amendment because of distaste for the remedy, ultimately destroys the Fourth Amendment itself. In 14 Cr. L. 2063, the Dissent explained:

> "Dissatisfaction with the exclusionary rule as the predominate remedy for conduct violating the Fourth Amendment is understandable and defensible. Attacks on the constitutional right of privacy as the means of expressing dissatisfaction with the remedy are intellectually indefensible and dangerous. A constitutional right continually diluted becomes no right. Destroying a right protected by the Fourth Amendment because of distaste for the remedy makes little more sense than destroying a patient for failure to respond to chosen medication. If the remedy is wrong, it is time to reexamine the remedy, not to diminish the right."

In Gelbard v. United States, 408 U.S. 41, 92 S.Ct. 2357, the Supreme Court held that the use of illegal electronic interceptions are proper defenses under certain circumstances. See, also, United States v. Giordano, 416 U.S. 505, 94 S.Ct. 1820.

Accordingly, the taped conversation between the Special Agent and Christensen should have been excluded since it violated Christensen's Fourth Amendment right to privacy.

The conviction for false declarations before the Grand Jury must, therefore, be reversed.

CONCLUSION

Petitioner respectfully prays that the Petition for a Writ of Certiorari be granted.

Respectfully submitted,

LAWRENCE W. KRIEGER

Dated:

New York, New York

February 14th, 1984

APPENDIX

APPENDIX A

OPINION OF THE COURT OF APPEALS

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

--

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 19th day of December, one thousand nine hundred and eighty-three.

Present:

HONORABLE WILFRED FEINBERG
Chief Judge

HONORABLE JAMES L. OAKES

HONORABLE LAWRENCE W. PIERCE
Circuit Judges.

83-1203 83-1249

UNITED STATES OF AMERICA,

Appellee,

-against-

FRANK J. LANDI and OLIVER C. CHRISTENSEN, a/k/a 'CHRIS CHRISTENSEN,"

Defendants-Appellants.

Opinion of the Court of Appeals

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged and decreed that the judgment of said District Court be and it hereby is AFFIRMED.

1. Appellant Landi argues principally that the district court erred in charging that a good faith belief that the bond was valid was not relevant as to Landi's overall intent. However, the judge did not so charge the jury, and the charge to the jury on good faith was both fair and proper.

2. Appellant Christensen challenges the jury charge on a variety of grounds. In particular, he argues the charge shifted the burden of proof to Christensen by declining to charge his theory of defense and several presumptions on which that defense was based. However, the court gave a fair charge to the jury embodying the essence of Christensen's defense and had no obligation to give the confusing and in many instances legally incorrect instructions proposed by Christensen.

3. Christensen also challenges the sufficiency of the evidence, but we find more than sufficient evidence to convict him on both the mail and wire fraud counts and the count charging false declaration before a grand jury. We also find no material variance between the mail and

wire fraud charges in the indictment and the proof at trial.

4. We have considered all of the arguments raised by appellants and find them meritless.

5. The judgments of conviction are affirmed.

/s/ Wilfred Feinberg
WILFRED FEINBERG, Chief Judge

James L. Oakes
JAMES L. OAKES,

Lawrence W. Pierce
LAWRENCE W. PIERCE,
Circuit Judges.

APPENDIX B

POST-TRIAL MEMORANDUM AND ORDER DATED MAY 18TH, 1983

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,	83 CR 64 CLB
-v-	
FRANK J. LANDI, OLIVER C. CHRISTENSEN, a/k/a CHRIS CHRISTENSEN,	
Defendants.	

MEMORANDUM AND ORDER

Brieant, J.

By oral motion, made on April 23, 1983, defendant Oliver Christensen seeks, pursuant to Rule 29(c), F.R.Crim.P. to set aside the jury verdict finding him guilty of making false declarations under oath before a Grand Jury in violation of 18

U.S.C. Section 1623.

Mr. Christensen's conviction for false statements arose from his testimony before the Grand Jury on February 2, 1982 in this district. On that date the Grand Jury was investigating a fraudulent investment scheme known as "Com Link Buy-Sell Program," which had been operated by co-defendant Frank J. Landi. It was also investigating the relationship, if any, to that fraudulent scheme of Casualty & Indemnity Company of Belize, Central America ("C&I"), an insurance company. In connection therewith, Mr. Christensen, a witness before the Grand Jury, was asked whether he owned any stock in C&I. In response to two different questions, he testified that he did not.

These answers led to his subsequent indictment in Count 16 of this 16 count indictment, for making false statements before the Grand Jury. He was also indicted, under 18 U.S.C. Section 2, for 15 counts of aiding and abetting his co-defendant, Frank Landi, in devising and executing a scheme to defraud in violation of 18 U.S.C. Sections 1341 and 1343.

After a two week jury trial, during the course of which 12 of the 15 aiding and abetting counts against Mr. Christensen were dismissed, the jury returned a verdict of guilty against both defendants as to all remaining mail fraud counts, and also found Mr. Christensen guilty on Count 16.

The oral motion of Mr. Christensen with respect to Count 16, the false

declarations count, was made immediately following the jury verdict. Following argument, this Court reserved decision.

The evidence introduced by the Government at trial established that on three occasions Christensen had made unsworn extrajudicial statements to others that he was the owner of C&I. Richard Burton, an attorney whose client was engaged in a business transaction with C&I, testified that Christensen had told him that he [Christensen] owned "certain insurance companies," including C&I. (Tr. pp. 498, 522). Lawrence Rush, the certified public accountant who prepared a financial statement for C&I testified that Christensen told him that he was the "sole owner" of the insurance company. (Tr. p.

327). Lastly, the Government introduced and played for the jury a tape recording on which Christensen told FBI Agent Donald McPherson, who was then acting in an undercover capacity, that he not only owned stock in C&I, but held the controlling interest. (Gov. Ex. T-2).

In opposition to the Government's case, Christensen, in addition to putting the credibility of the Government witnesses in issue, relied on the sworn testimony stipulated to have been given before the Grand Jury, to the effect that he was not a shareholder, and also introduced in evidence his own out-of-court statement to the case agent, to the same effect, made immediately prior to entering the Grand Jury room, which statement carries indicia of truthfulness

because made under the penalty of 18 U.S.C. Section 1001. Defendant rested on these items of evidence, and his presumption of innocence.

The applicable standard for determining this motion under Rule 29(c), F.R.Crim.P. to set aside a jury verdict of guilty is "whether, upon the evidence, giving full play to the right of the jury to determine credibility, weigh the evidence and draw justifiable inferences of fact, a reasonably (sic) jury might conclude guilt beyond a reasonable doubt." United States v. Taylor, 464 F.2d 240, 243 (2d Cir. 1971), quoting Curley v. United States, 160 F.2d 229, 232 (D.C. Cir.), cert. denied, 331 U.S. 837 (1947). Moreover, in evaluating the evidence, this

Court must resolve all reasonable inferences in favor of the prosecution and must view the evidence in the light most favorable to the Government. United States v. Artuso, 618 F.2d 192, 195 (2d Cir.), cert. denied, 449 U.S. 861 (1980).

Applying this standard to the evidence presented by the Government in connection with Count 16, defendant Christensen's motion must be denied.

Essentially, defendant Christensen argues that his own extrajudicial admissions coupled with conduct consistent with the truth of these admissions, are insufficient, absent either additional testimony or documentary evidence, to support his conviction. This argument attempts to interpret the statute in a manner unsupported either by its express

language or its legislative history.

Section 1623(e) of Title 18 provides: "It shall not be necessary [under this statute that] proof be made by any particular number of witnesses." In this respect the quantum of proof needed to establish false declarations under section 1623 is less than that necessary to prove perjury under section 1621. That latter section requires perjury be proved either by the testimony of two witnesses or by the testimony of one witness corroborated by independent evidence. United States v. Cohn, 452 F.2d 881 (2d Cir. 1971), cert denied, 405 U.S. 975 (1972). In enacting section 1623 Congress specifically eliminated the so-called "two witness rule" for prosecutions under this new

section. United States v. Mancuso, 485 F.2d 275 (2d Cir. 1973). Section 1621, Perjury, remains alive, but it is hardly ever used.

There is no doubt that the testimony of these witnesses recounting Christensen's statements, along with the tape recording of his voice, were admissible against the defendant. Under Rule 801(d)(2)(A), F.R.Evid. the statement of a party, offered against him at trial, is not hearsay and is admitted as substantive evidence. United States v. Cline, 570 F.2d 731 (8th Cir. 1978). The statement need not have been against the party's interest at the time it was made, United States v. Rios Ruis, 579 F.2d 670, 676 (1st Cir. 1978); indeed, it may have been self-serving, as were these

statements made by Christensen.

Admissions, unlike the majority of hearsay exceptions, are admitted not on the basis of the probability of trustworthiness, but because a party cannot object to the failure to cross-examine himself. 4 Weinstein's Evidence, 801(d)(2)[01]. Moreover, "[a] party can hardly object that . . . he is unworthy of credence save when speaking under oath." Morgan, Basic Problems of Evidence, 266 (1960).

This rationale underlying the admissibility of a party's admissions refutes Christensen's argument that he cannot be convicted on the basis of contradictions between his sworn judicial testimony and his unsworn extrajudicial

statements because his Grand Jury testimony is inherently more reliable. The jury was entitled to evaluate the credibility of the Government's witnesses, and determine when Christensen spoke falsely and when he told the truth.

Therefore, either the testimony of Mr. Burton or Mr. Rush that Christensen had stated that he owned C&I, or Christensen's own statement to that effect heard clearly on the tape introduced by the Government, standing alone, would have been sufficient to support a conviction on Count 16. Taken together, and corroborated by Christensen's conduct with respect to C&I, they provided ample grounds for the jury to find, beyond a reasonable doubt, that Christensen had testified falsely when he told the Grand

Jury that he did not own any stock in C&I.

In addition to portraying himself as the owner of C&I, Christensen also made statements and conducted himself in a manner which was consistent with his alleged ownership and control. Numerous witnesses testified that Christensen had presented himself as the President and Chairman of the Board of C&I. See, e.g., testimony of Richard Burton (Tr. p. 501); Matthew Mezzanotte (Tr. p. 383); Richard Witkowsky (Tr. p. 235); and Lawrence Rush (Tr. p. 327). Moreover, Lawrence Rush, the certified public accountant employed by C&I, testified that beginning in August of 1978 he had a series of conversations with Christensen in which they discussed the preparation of the company's financial

statement. Rush further testified that on various occasions Christensen promised to provide him with information concerning the assets of C&I, including the supposed location of time deposits, marketable securities and bank accounts. Finally, Rush testified that he discussed his compensation for these financial services with Christensen. The jury was entitled to consider this behavior by Christensen and his statements regarding his position at C&I as bearing on whether he owned stock in the company. As our Court of Appeals said in United States v. Tramunti, 500 F.2d 1334 (2d Cir.), cert. denied, 419 U.S. 1079 (1974), in determining the sufficiency of the evidence in a Rule 29 motion, "the evidence must be viewed in

light of the totality of the Government's case, since one fact may be given color from others." Id. at 1338.

Christensen also argues that his conviction for making false declarations before the Grand Jury should be set aside because the Government failed to produce stock certificates or any other tangible evidence of his actual ownership of C&I. The simple answer to this argument is that the Government was not required to do so. Any suggestion that the Government must prove a violation of section 1623 with documentary evidence is refuted by the language of the statute itself. Section 1623(e) provides: "It shall not be necessary that proof [under this section] be made . . . by documentary or any other

type of evidence." The Government was therefore under no requirement to produce any documentation of Christensen's ownership of C&I as a prerequisite to his conviction under this section.

Nonetheless it should be pointed out that the Government made substantial efforts to obtain the records, if any, of this foreign corporation. At trial, counsel for Christensen introduced a letter, dated July 26, 1978, from an attorney in Belize City, Belize (formerly British Honduras) to Christensen (Defendant's Ex. BI). The letter stated that C&I was incorporated under the laws of Belize and that the certificate of incorporation along with other corporate records had been forwarded to the Barclays Bank in California.

These documents, if available and offered at trial, would not have been withiin the attorney-client privilege and so would have been admissible against Mr. Christensen. As the Court said in United States v. Mackey, 405 F.Supp. 854 (E.D. N.Y. 1975), "the names of shareholders, which are clearly a matter of corporate record, are not normally the kind of confidential information which is subject to the attorney-client privilege. This is true even of a closely held corporation . . . " Id. at 859. Cf., United States v. Katz, 623 F.2d 122, 123 (2d Cir. 1980) (cannot claim attorney-client privilege with respect to public documents); United States v. Silverman, 430 F.2d 106, 121-22 (2d Cir. 1970), cert. denied, 402 U.S. 953

(1971) (same).

However, in oral argument concerning this motion the prosecutor stated that although the Government had attempted to obtain the corporate records of C&I by subpoena from a variety of sources, including Mr. Christensen and the Barclays Bank, it had been unable to do so. While the existence of these unanswered subpoenas was a fact not known to the jury at the time of its verdict, and so cannot be considered in this Rule 29 motion as evidence supporting the Government's case, it does belie Mr. Christensen's contention that the Government "never even made an attempt" to discover the facts as to the true ownership of C&I.

For the foregoing reasons, defendant

Post-Trial Memorandum and Order
Dated May 18th, 1983

Christensen's motion is denied.

So ordered.

Dated: New York, New York
May 18, 1983

Charles L. Brieant
CHARLES L. BRIEANT
U. S. D. J.

APPENDIX C

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

Due Process Clause of the Fifth Amendment:

> "No person shall be . . . deprived of life, liberty, or property, without due process of law."

Section 632 of California's Penal Code:

> "(a)Every person who, intentionally and without the consent of all parties to a confidential communication, by means of any electronic amplifying or recording device, eavesdrops upon or records such confidential conversation, whether such communication is carried on among such parties in the presence of one another or by means of a telegraph, telephone or other device, except a radio, shall be punishable...".
>
> (b) The term 'confidential communication' includes any communication

carried on in such circumstances as may reasonably indicate that any party to such communication desires it to be confined to such parties . . . "

(d) Except as proof in an action or prosecution for violation of this section, no evidence obtained as a result of eavesdropping upon or recording a confidential communication in violation of this section shall be admissible in any judicial, administrative, legislative or other proceeding."

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